No. 13334.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MERSHON COMPANY, INC.,

*Appellant,*

*vs.*

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing business under the fictitious firm name and style of PACHMAYR GUN WORKS,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

### Re: Issue of Res Judicata.

In their opening brief, appellant carefully reviewed the law relating to what is concluded by a former judgment relied upon as *res judicata* in a later action. This law may be summarized as follows:

> "A judgment is conclusive only as to those findings which are necessary for its support."
>
> *Chapman v. Hughes,* 134 Cal. 649, 654-655.

The authorities cited in appellees' brief do not hold otherwise. In each of the cases cited in appellees' brief, the matters or findings which were found to be concluded

by the former judgment *were necessary for the support of that judgment.* For instance, in *Bank of America v. McLaughlin,* 40 Cal. App. 2d 620, principally relied upon by appellees, the matters and questions referred to in the findings in the former action were not only necessary for the support of the judgment, but they were also recited in the judgment—neither of which is true of the former judgment relied upon by appellees here as *res judicata.*

In the former action with which we are here concerned, the judgment in which is relied upon by appellees as constituting *res judicata,* there were two inconsistent defenses: (1) that the action was barred by an agreement under which the defendants (appellees here) agreed to and did abandon use of the White Line symbol, and plaintiff (appellant here) agreed to waive suit therefor; and (2) that the use of the White Line symbol by said defendants did not constitute unfair competition. On appeal, the District Court of Appeal determined that the action was barred by said agreement and that the matter of whether or not use of the White Line symbol constituted unfair competition was immaterial.

The present action is merely for the resumption of the use of the White Line symbol by the defendant after he obtained that judgment, and does not seek any relief for acts committed during the period covered by the former action.

The question here, therefore, is really one of whether the former judgment creates an *estoppel,* rather than one of *res judicata;* and it is submitted that the defendant's acts in obtaining the former judgment upon the representation to the Court that he had abandoned use of the White Line symbol and then deliberately resuming its use after

obtaining the judgment upon that premise, is inequitable conduct which would bar appellees from invoking the estoppel even if the former judgment were capable of creating an estoppel.

## Re: Issue of Trade-mark Infringement and Unfair Competition.

In their opening brief, appellant cited authorities unanimously supporting the rule that where a trade-mark consists of both words and a symbol, both having the same meaning, it is trade-mark infringement or unfair competition for another to use *either* the words or the symbol. Appellees have not cited any contrary authority.

Here, appellant's mark consists of the words "White Line" and also of the White Line symbol. Appellant's pads are advertised and marked as "White Line" pads. It appears too obvious to admit of argument that if appellees should be permitted to use either the symbol or the words, confusion is bound to result—and the undisputed evidence shows actual confusion.

## The Complaint and Answer in the Former Action Do Not Appear to Be Before the Court.

In their opening brief, appellant made the statement that there was not before the Court sufficient of the proceedings in the former action to enable the Court to determine what facts were referred to in the findings in the former action; that while the findings and conclusions were placed in evidence [R. 239], the complaint and answer, to which the findings refer by reference, were not placed in evidence. Appellees' brief contradicts this statement.

Attention is directed to the fact that, according to the record, although appellees did start to place the complaint and answer in evidence, the following colloquy took place [R. 217-218]:

> "The Court: * * * I might say to counsel that, unless I change my mind, I am not going any further back than the findings and judgment. I am not going to retry that case. * * *
>
> Mr. Hamblin: That is correct. *I think the findings and conclusions are all that need to be offered.*"

## Conclusion.

Appellant therefore again submits that the judgment appealed from should be reversed.

Respectfully submitted,

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